undesirable to guarantee "licensee responsibility." Network Broadcasting by Standard AM and FM Stations, 63 FCC 2d 674 (1977). The Commission then stated, in part:

> " . . . even if undesirable situations develop in a few cases, these will be so small in light of the vastly increased number of stations, and the greater number of networks, that no significant harm to the overall public interest would be expected. In addition, the Commission has since enunciated some of the important policies involved; for example the importance of licensee responsibility, and freedom from restraints on exercise of licensee programming judgment, have by now been set forth in well-known Policy statements, e.g., Report and Order re: Commission En Banc Program Inquiry, 20 R.R. 1901 (1960) and Agreements between Broadcast Licensees and the Public, 57 FCC 2d 42, 35 R.R. 2d 42, 35 R.R. 2d 1177 (1975). These make unnecessary the maintenance of specific rules embodying the concepts." (at p. 679)

In the 1960 Statement of Policy referred to, the Commission placed on licensees the ultimate legal responsibility for all programming broadcast through their facilities, but at the same time recognized that

> " . . . the structure of broadcasting, as developed in practical operation, is such -- especially in television -- that, in reality, the station licensee has little part in the creation, production, selection and control of network program offerings. Licensees place "practical reliance" on networks for the selection and supervision of network programs which, of course, are the principal broadcast fare of the vast majority of television stations throughout the country." (20 RR at 1913)

The situation today in television in this respect is identical to radio in 1977. From a competition policy standpoint, there is no basis for a right to reject rule. And insofar as licensee responsibility is concerned, that principle is clear and unambiguously applicable to all arrangements made by the station, whether with networks or with others.[4] A specific right to reject rule -- applicable only to stations' arrangements with broadcast networks -- is unnecessary.

There is no evidence that television networks have imposed or wish to impose on their affiliates programs that affiliates believe are unsatisfactory or unsuitable or contrary to the public interest. Indeed, all the networks but the WB Network are themselves licensees of broadcast stations and for that reason alone would not wish to carry unsatisfactory or unsuitable programming on their networks. Nor is there evidence that networks are more likely than other program suppliers to deliver unsatisfactory and unsuitable programming to stations. But the Commission has adopted no similar requirement that stations retain a rejection right in their dealings with those suppliers.

In fact, without the protection of a rule, stations in their usual forms of agreement with syndicated program suppliers often retain the right to reject programs they believe to contain material contrary to the public interest, or to substitute

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[4] Indeed, the Commission in its 1977 decision for radio, stated that "these services [all interconnected program suppliers including newswire services] are in exactly the same position as the conventional networks with respect to the concepts now under discussion, and therefore the same considerations apply" (63 FCC 2d at 680).

programs of local or national importance. However, stations usually agree to remain under a financial obligation to the syndicator to in some way make good the economic loss to the syndicator in connection with any advertising the syndicator may have included in the rejected program. For example:

- the Warner Brothers form agreement requires the commercial announcements furnished by the syndicator to be carried in another episode of the same program during the same broadcast week as the preempted program, and if that is not possible, the station must pay to the syndicator, in cash, the local market value of these announcements;

- the Group W Productions form agreement requires the station to broadcast all the syndicator's commercial announcements within the preempted program within seven days of the preemption in a mutually agreeable time period;

- the Multimedia Entertainment form agreement requires the station either to broadcast the program or all the commercial inventory in a comparable or better time period;

- the Paramount Pictures form agreement requires the station to broadcast the program in a mutually-acceptable time period, or if that is not possible, to broadcast the commercial announcements sold by Paramount within seven days of the preemption; and

- the Buena Vista form agreement does not have any provision permitting rejection of a program as unsatisfactory but allows preemption only for "late-breaking news, an event of urgent national importance, or to broadcast a unique, one-time special event," whereupon the station must broadcast the commercial announcements within seven days in the same time period as the preempted program.

Thus, the parties to program supply arrangements not subject to Commission interference have worked out their own marketplace solutions which recognize the stations' licensee responsibility and the program suppliers' economic needs.

The right to reject rule puts broadcast networks at a competitive disadvantage relative to program suppliers who can negotiate program carriage terms without regulatory interference. As the Notice points out, the rule can be used as a pretext when a station wants to reject a program, not because it is unsatisfactory in any public interest sense but because the station can further some short-run economic interest.[5] For example, NBC has surveyed those of its affiliates who do not carry its "Leeza" weekday "talk" program to find out what programs they broadcast instead. None carries a local program; all carry syndicated programs, almost all of which are other "talk" programs, with a tiny percentage consisting of syndicated situation comedies or dramas. It is clear that "Leeza" is not being rejected for reasons related to the core concept of "licensee responsibility," but because the stations believe it is in their economic or competitive self-interest to offer viewers a different program.

NBC is not contending that its affiliates should be prevented from preempting network programs. In fact, the principles of licensee responsibility require that they be able to do so. This principle is reflected in NBC's new long term affiliation contracts, and will survive regardless of what the Commission decides in this proceeding. NBC's affiliation contracts expressly give an affiliate the freedom to preempt NBC Network programming for local news, or if it believes the programs the Network offers would not be suitable for the particular local community. In short, as in the case of agreements with other program suppliers, the issue of non-

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[6] It was used more than 30 years ago to justify prohibition of steeply graduated affiliate compensation plans on an entirely economic basis (Notice, fn 27).

clearances and preemptions of network programming can be, and have been, worked out as a matter of contract in a manner that is satisfactory to both parties and is consistent with the public interest. NBC should be able to negotiate commercial arrangements with our affiliates that protect our network business against the economic consequences of non-clearances above a certain level, so that we can continue to make the huge investments in programming that will keep our network programming service strong and competitive, benefiting the entire network/affiliate distribution system as well as the public.

Indeed, even under the current rule, in a spirit which recognizes their mutual needs for a strong broadcast schedule of network and local programming, NBC and its affiliates have worked out long-term, mutually agreeable arrangements which recognize each affiliate's ultimate licensee responsibility for what it broadcasts and also give NBC the assurance it needs of over-all clearance levels in order to make the long-term program investments so vital to both affiliates and the network in today's competitive marketplace. While the precise terms of these arrangements may differ, they essentially provide for each licensee to be the ultimate arbiter of its licensee responsibility and provide it with ample broadcast time to broadcast its own programs while also providing for network program clearance levels that assure carriage of the network service that is so important to both NBC and the public. These agreements are generally for periods as long as ten years with substantially increased compensation to the affiliates, a commitment by NBC not to reduce availabilities within network programs for station sale, and will continue in effect regardless of whether or not the rule is repealed. Therefore, whether or not the rule is repealed at this time will actually have no significant effect on NBC's current arrangements with its affiliates.

Proposal to "Clarify" the Rule

The proposal in the Notice to "clarify" the rule (¶25) attempts to address the issue of "economic" vs. "legitimate" preemptions and non-clearances. NBC applauds the fact that the Notice recognizes this distinction. There certainly is no public interest basis for a rule that might protect stations' "economic" preemptions. However, we see no reason for the Commission to adopt a new rule which attempts to micromanage this distinction. Clearly, radio networks and their affiliates and television stations and their non-network suppliers have managed their relationships in a way which has provided each of the parties with the ability to achieve their commercial objectives without impinging on the station's licensee responsibility. NBC believes that television networks and their affiliates can similarly structure their commercial arrangements in a manner which recognizes the station's responsibilities as a licensee.

The marketplace problems are too complex and ever-changing for a governmental rule to be very effective here. They involve a whole range of issues that do not affect licensee responsibility and do not lend themselves to solution by rule. For example, we don't think there should be a government rule forbidding a station from rejecting a network program in order to carry even an "important" program if that program can just as well be broadcast at another time period when the station is not carrying network programming, or forbidding a station from agreeing not to preempt network programming to carry a "taped" syndicated or local program that could well be carried at some other time. The various facets of the "clarification" proposal can far better be worked out in the network/affiliate relationship, based on their mutual recognition of the bedrock principle of licensee responsibility.

Surely the Commission does not and should not want to entangle itself in such questions, which are best left to the parties to resolve. No one believes that radio licensees have relinquished the ability to exercise licensee responsibility because there is no FCC right-to-reject rule that governs their dealings with radio networks and syndicators. No one believes that television licensees have lost the ultimate responsibility for programming their stations because the right to reject rule does not apply to their arrangements with non-network program suppliers. There is no justification for a different approach when it comes to the program carriage arrangements between television licensees and broadcast networks. The public interest would be served, not harmed, if networks and affiliates were similarly able to work out the terms of program carriage in marketplace negotiations.

V. THE TIME OPTION RULE (73.658(d))

As the Notice points out, the time option rule involves many of the same basic considerations as the right to reject rule, and therefore the discussion in section IV of these Comments is equally applicable here. Fundamentally, since nothing can supersede a licensee's ultimate right to determine what programs it broadcasts, there is no policy justification for a government rule that prohibits commercial arrangements between networks and affiliates with respect to mutually agreed-upon network time periods that both parties deem to be beneficial.

The Notice also refers to the fact that even when time optioning was permissible, the Barrow Report study found that the practice was not used by networks to force stations to clear programming they did not want, and there was in fact no difference in station clearance rates or practices with respect to programs supplied to affiliates in option time and non-option time (¶29). In light of the relationship between networks and their affiliates today, in a marketplace that bears no resemblance to the one described in the Barrow Report, the rationale for maintaining the rule is hard to fathom. The rule is clearly not required to protect affiliates against unwanted network encroachment on local time.

There is no reason to believe that, without a Commission rule, affiliates who now program certain time periods themselves would in fact grant a network an "option" on those time periods. NBC's affiliates obviously did not succumb to the network's requests to clear several now canceled daytime programs; they clearly could resist any "pressure" to agree to an option for future programs during those daytime hours if the rule were repealed. In other words, there is no basis to expect that a station which now refuses to clear a program could be persuaded to grant a network an option requiring it to accept that or any other program. There is no public interest reason for the Commission to have a rule which interferes with the evaluations and decisions of the parties themselves.

On the other hand, time optioning might be used by networks (both the three original networks and newly developed networks) to arrange in advance for affiliate clearances sufficient to support innovative quality programming, perhaps in new time periods, to most or all of its affiliates.

Finally, there is no reason to retain the time option rule in order to assure access to stations for non-network programs.

The marketplace has vastly expanded from the days of this rule's adoption, and the Commission has itself concluded that there is no shortage of broadcast and non-broadcast outlets for non-network programs (e.g., see supra, pp. 10-11 and 15-18).

Notice of Exercise of Option

The Notice inquires as to whether time optioning might impose a burden on affiliates because: (1) in order to retain "control" over what it broadcasts, the station needs both advance information of the proposed program and time to consider its acceptance and (2) if it does not accept the network program, the station needs time to arrange for alternative programming and advertising. The Notice therefore proposes the adoption of a new rule in which the government will define an appropriate notice period or periods for established and newly developed networks to exercise their options.

NBC believes this is an area best left to the marketplace. There can be no standard length of notice a network can give of a change in its schedule. While NBC usually announces its Fall schedule in May of each year, that schedule is constantly being modified throughout the broadcast season, often on very short notice due to the availability of new or special programs, the failure of programs to develop an audience, delays in production, the coverage of special events, etc. Some changes are made weeks in advance, some only days or even hours in advance. Such changes and substitutions have never threatened to compromise licensee responsibility or stations' ability to provide substitute programming and advertising. These program changes have not been a significant issue of contention between its affiliates and NBC.

NBC believes it would be impossible, and certainly impractical, to operate according to a government rule that establishes an arbitrary fixed notice period. Such a rule would have no practical value to the parties, either for established or newly developing networks or their affiliates. These are operational details best left to the parties themselves to work out.

VI. EXCLUSIVE AFFILIATION RULE (73.658)a))

This rule prohibits arrangements between stations and networks that prevent the station from broadcasting the programming of another network. The rule was adopted out of concern that exclusive affiliations would make it overly difficult for new networks to line up stations to carry their programs. This concern may have been valid for radio in 1941, when fewer than 50 of the 92 largest markets had three or more full-time radio stations or for television in the 1950's when only 16 markets had more than three television stations. But today, in television, when the Notice notes that the vast majority of markets have 4 or more commercial stations, 103 markets have more than 5 stations, 76 markets more than 6, and 44 markets more than 7, neither the concern nor the rule makes any sense. In a marketplace where several new networks have been able to find their own primary broadcast affiliates (and fill in otherwise unserved areas through cable carriage or other forms of distribution), the issue now is whether there is any public interest benefit to a government rule prohibiting exclusivity. We submit there is none.

The Notice concedes that in the larger markets there are enough stations to allow all the many present networks to have their own affiliates. But it also correctly notes that in the smaller markets, where there are more networks than stations, it is the <u>stations</u> who hold the stronger bargaining position in these negotiations because the "demand" for affiliates is greater than the "supply" (¶37).[6] Thus, in effect, this rule prohibiting a station from affiliating exclusively with one network is a restraint on <u>station</u> choice, not on that of a network. Moreover, if a station chooses to be an affiliate of only one network, it can do so without a contractual provision, merely by declining a second network's offer of programming.

In NBC's case, only two of its affiliates are secondarily affiliated with other networks, in Great Falls, Montana (Fox),

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6 This is in fact the case in all markets where NBC has secondary affiliations or where its affiliates also carry other networks.

and Raleigh, North Carolina (WB). On the other hand, NBC has secondary affiliations with seven stations, in Fairbanks and Juneau, Alaska; Glendive, Montana; Grand Junction, Colorado; Presque Isle, Maine; Salisbury, Maryland; and Ada, Oklahoma. Thus, to the extent all these stations may choose exclusive affiliation and refuse to agree to a secondary affiliation, NBC would lose more than it would gain.

It is not at all clear who the rule is protecting or why such protection is necessary. All the rule does is deprive a station of the opportunity to generate some economic or negotiating value in return for its agreement to be exclusive. The Notice correctly points out the important benefit exclusive affiliation provides to both the station and the network (¶36): "identification with a given network through exclusive affiliation may be important to terrestrial broadcast stations attempting to differentiate themselves in an increasingly crowded video marketplace." In this increasingly crowded and competitive video marketplace, where more that 55% of the audience has a choice of more than 40 channels,[7] such identification of stations with their networks will be increasingly important. NBC has found that the audience tends to identify its affiliates primarily by their channel number and the fact that they are affiliated with NBC. For this reason, NBC itself promotes its

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[7] Nielsen Media Research, Television Audience 1994, p. 14; week of August 29-September 4, 1994.

owned stations as "NBC [channel number]" rather than by call letters. For example, it promotes WRC-TV, Washington, D.C. as "NBC 4." Other networks and affiliates appear to be doing the same.

If broadcasters cannot "brand" themselves in this increasingly crowded video marketplace, it will reduce their ability to compete with distribution systems that can provide exclusivity and differentiation.

Earlier this year, the Commission eliminated its prohibition against dual affiliations in markets with three or fewer stations. Regulations Governing Television Broadcasting, 10 FCC Rcd 4538, 77 RR 2d 453. The so-called "unequal facilities" rule was designed to give independent stations the ability to affiliate with a network that did not have a primary affiliation in the unequal facilities market before an existing affiliate took on a secondary affiliation. Citing the "plethora of first-run and off-network programming" available to independent stations today, the Commission concluded that independent stations no longer needed the "benefit of a regulatory right of first refusal on some programming of the three traditional networks" (at 4542). Obviously, this "plethora" of non-network program sources exists because of the availability of broadcast outlets in communities across the country. And the Commission found that the new networks have been choosing to affiliate with primary affiliates rather than opt for secondary affiliations with stations already affiliated with other networks (at 4542). Thus, the same marketplace conditions that led the Commission to repeal the "unequal facilities" rule also compel elimination of the rule that prohibits exclusive affiliations.

Neither stations nor program suppliers are in need of government protection. The marketplace and individual stations and networks should determine whether stations obtain primary or secondary affiliations -- or any affiliation at all.

VII. <u>DUAL NETWORK RULE (73.658(g))</u>

The dual network rule discriminates against free, over-the-air broadcasting and is inimical to the competition and diversity goals it was designed to foster. Fifteen years ago, the NISS concluded that the rule did not promote the public interest:

> ". . . any ban on dual networking achieved by internal firm expansion may serve only to reduce unnecessarily the diversity and quality of network services by reducing competition and efficiency." (<u>Network Inquiry Report</u>, Vol. I, p. 370).

Since 1980, the competitive position of over-the-air broadcasting has been steadily eroded by competition from various pay media that are not subject to dual network restrictions. There is no Commission restriction on the number of cable or DBS networks a single entity can own -- it has no apparent concern that such common ownership is a threat to diversity or competition.[8] The consequence of this disparate regulatory treatment is that two of the three original broadcast networks have been forced to channel new investment into non-broadcast activities. Discouraging network investment in broadcast program services can hardly serve the Commission's diversity goals or the public interest. Yet that is the principal effect of the dual network rule. It thereby deprives television stations and their viewers of a broader range of program choices, and it reduces competition among program services for distribution on broadcast stations.

The dual network rule was adopted in response to marketplace conditions in radio that existed over 50 years ago, when the shortage of distribution facilities and the paucity of program services allowed NBC, then a dominant broadcaster operating two of the three dominant radio networks, to wield enormous power that the Commission feared could potentially limit competition. Today there is neither a shortage of distribution outlets nor a shortage of program sources serving individual stations or viewers. When the radio dual network rule was repealed nearly 20 years ago, the Commission recognized that the only lingering effect of the rule was to deprive stations, and ultimately the public, of a wider variety of program choice. The television

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[8] For example, Turner Broadcasting System owns CNN, CNN Headline, WTBS, TNT and the Cartoon Network. Paramount/Viacom owns Showtime, USA Network, The Movie Channel, Nickelodeon, MTV, Lifetime, VH-1, Comedy Central and the Sci-Fi Channel

dual network rule has now become similarly unnecessary and counterproductive.

While the need for a dual network rule has disappeared, the cost to the public of maintaining the restriction has increased. The Notice inquires about the many network business opportunities that may be foreclosed by virtue of the rule, including the development of multichannel services for affiliates using video compression and digitization technology. There is in addition the possibility of greater use of network newsgathering and other resources to provide enhanced service to local stations,[9] creation of alternative language feeds or time shifting of the type being utilized by the cable industry, and the development of special regional networks for news or sports programming.

Repeal of the dual network rule would thus allow networks to contribute to the diversity of programming available to stations and viewers. At the same time, the networks could better utilize their resources and expertise to develop additional revenue opportunities in broadcast, rather than solely in cable network and DBS programming services.

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[9] If, for example, the duopoly rule is modified, network affiliates may own additional stations in or near their existing markets. But an affiliate's network could not provide new program services -- such as a national or international news program channel -- to its second outlet under the current rule.

The Commission need not fear that elimination of the rule would prevent the entry of new, independent programming sources, which are more likely to lack (or require more time to arrange for) the funds needed to create a full complement of programming for new distribution channels. The arrival of the Fox, United Paramount and WB Networks demonstrates that the desire and financial resources clearly has existed to launch competing network services. All the dual network rule does is to prevent these new broadcast networks, as well as NBC, ABC and CBS, from competing as networks against first-run syndicators and cable programmers who may distribute as many different overlapping, simultaneous program services as they choose.

VIII. NETWORK TERRITORIAL EXCLUSIVITY (73.658(b))

As the Notice correctly points out, "this rule is more concerned with the competition between broadcast television stations for viewers and advertisers than the competition between networks for affiliates" (¶46). In a marketplace characterized by abundant choices for stations, program suppliers and viewers, there is no reason to perpetuate regulation of this competitive dynamic.

A. Exclusivity Against Other Stations in the Same Community from Broadcasting Programs Not Taken by the Affiliate

The policy concern underlying this aspect of the territorial exclusivity rule was that a contractual provision granting an affiliate exclusivity even with respect to programs it did not clear would deprive the public in that community of the program not carried by the affiliate. While that is theoretically true, the fact is that in most cases that NBC offers a rejected program series to other stations in that community, it is also rejected by the other stations. These other stations often reject the proffered NBC program series for one or more of the following reasons: they have no interest in promoting NBC network programming; their schedule counter-programs the NBC affiliate and the particular program does not "fit;" the series is generally one that attracts a smaller audience; they fear that if the series becomes more popular the NBC affiliate will seek its return; and a syndicated program offers them greater audience potential, greater revenue and/or greater stability of schedule.

One-time-only rejections (that is, failure to carry a particular program in a series or a one-time-only special program), are almost never accepted by other stations, to such an extent that NBC rarely offers them any more.[10] In addition to the reasons stated above, one-time-only broadcasts are hard to

10 During the entire 1994-95 broadcast season, there were only 65 such placements, totalling about 55 hours (excluding one market where the licensee has agreed to sell the affiliate).

promote to an audience that identifies the program with the regular NBC affiliate, and the regular audience has a hard time finding the program.

NBC cannot now predict the extent to which networks and affiliates might agree to exclusivity if it were legally possible to do so. Even though such agreements may restrict NBC's ability to place its programs on alternate facilities, there could be sound business reasons (as with station exclusivity discussed above) to clearly identify a station as the NBC outlet in the particular market, and to assure an affiliate that NBC considers that station to be our exclusive outlet in that market. These considerations have prompted NBC in most cases to agree to grant affiliates as much exclusivity as Commission regulations will allow. Thus, since the Commission's rules do not prevent NBC from granting exclusivity as to non-broadcast media, we have done so, as recognized in the Notice (¶48).

B. Exclusivity Within a Geographic Area

The second prong of the rule forbids an affiliate from contracting for the exclusive right to a network's programming beyond its community of license. The fact is that networks have, on their own and without any contractual obligation, given their affiliates de facto exclusivity beyond their communities of license because affiliating with stations with substantially overlapping service areas can be costly and inefficient. Unless the overlapping stations serve primarily separate metropolitan communities (e.g., Washington, D.C.- Baltimore), from the network's point of view, the smaller the overlapping service areas, the better.

While in practice the rule has not had a significant impact on network/affiliate relations, its elimination would enable the parties to reach agreements which may more accurately fit the particular situation. For example, a station may wish to attract an audience in a particular community within its service area but may not want to affiliate with a network that provides service to that community from another station. There is no public interest reason it should not be able to assure itself by contract that the network recognizes it as the only station on which that community receives that network service for the duration of its affiliation. Lacking that assurance, the station might prefer to become affiliated with another network. This kind of exclusivity can be an important consideration for a station -- as important as compensation, length of contract or other contractual terms. Under the current rule, the parties must be careful not to reach any agreement on what might be an important term. With all the competing program sources available to stations today, there is no public interest reason to prohibit networks and affiliates from negotiating and agreeing on exclusivity, just as other program suppliers can.

IX. CUMULATIVE EFFECTS

Repealing all the network/affiliate rules will not have a cumulative effect that is detrimental to the public interest for a number of reasons:

A. Repeal of each of them is in the public interest.

B. Repeal of all the similar rules for radio -- the industry for which they were originally devised -- has not had any detrimental effect.

C. The marketplace basis for the rules, the dominance of an industry by two network companies, does not exist.

D. There is a healthy, competitive program supply and broadcast distribution marketplace which will continue to thrive without these rules.

E. The rules hamper the ability of broadcast networks and stations in allowing them to manage their commercial relationships efficiently and economically based on marketplace considerations.

F. The rules handicap the broadcast network/affiliate system's ability to compete in the video marketplace against other program suppliers and distributors that are not saddled with comparable restrictions.

In short, these are unnecessary regulatory restraints which are anachronisms in today's marketplace. They hamper competition and efficiency without providing any public interest benefit. They should have been repealed years ago, as recommended in 1980 by the Commission's own Network Inquiry Special Staff. Certainly their repeal should be delayed no longer.

Respectfully submitted,

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